

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-2154

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HOWARD LIPINSKI,

Petitioner-Appellant,

-against-

PEOPLE OF THE STATE OF NEW YORK,

Respondent-Appellee.

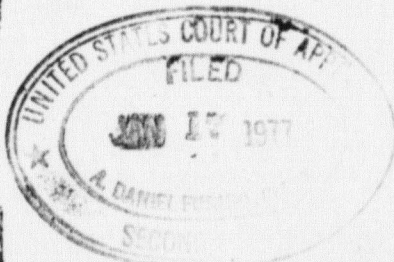
Docket No. 76-2154

APPENDIX TO THE BRIEF
FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
HOWARD LIPINSKI
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLLIS SKLOOT BAMBERGER,
Of Counsel.



PAGINATION AS IN ORIGINAL COPY

ST/OFFICE	DOCKET		FILING DATE			J	N/S	O	R	R 23	S	DEMAND		JUDGE NUMBER	JURY DEM.	DOCKET	
	YR.	NUMBER	MO.	DAY	YEAR							OTHER				YR.	NUMBER
208-1	76	2845	06	28	76	3	535							0803		76	0015

PLAINTIFFS

DEFENDANTS

LIPINSKY, HOWARD

THE PEOPLE OF THE STATE OF NEW YORK,

J.C.

CAUSE

Petition for a writ of Habeas Corpus.

76

2154

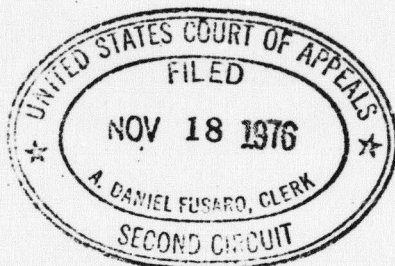
Pro Se.

Howard Lipinski
525 Riverside Ave.
Yonkers, N.Y. 10705
(914) 968-0370

ATTORNEYS

Vincent L. Leibell, III c/o
Atty. General - State of New York
2 World Trade Center, NYC 10047

Carl A. Vergeri
District Attorney of Westchester County
County Court House
111 Grove Street, White Plains, NY 10601



☐ CHECK
HERE
IF CASE WAS
FILED IN
FORMA
PAUPERIS

DATE

JUN 28 1976

FILING FEES PAID

RECEIPT NUMBER

072-387 (WTC)

C.D. NUMBER

STATISTICAL CARDS

CARD DATE MAILED

JUN 28 1976

JS-6

07/07/76


UNITED STATES DISTRICT COURT, DUCKET

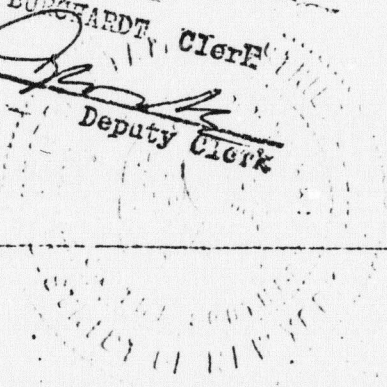
16 Civ. 1845 Howard Lipinski, vs. The People of the State of New York,

DATE	PR.	PAGE 2	PROCEEDINGS	MARKER, J.
7-8-76	(1)	Filed Petition for a writ of Habeas Corpus.		
7-8-76	--	HEARING BEGAN AND CONCLUDED. Writ denied - stay vacated - surrender 7-14-76 -- Marker, J.		
7-08-76	2	Filed defts opposition to w/h/c		
7-09-76	3	Filed defts affdva. of Vincent L. Lathall, III in opposition to pet. for W/H/C		CAV
7-09-76	4	Filed respondents brief, Supreme Ct. State of NY as EXHIBIT		
7-09-76	5	Filed plffs Order to show cause for a writ of H/C. - ret. 7-1-76 with memo endorsed. Writ of H/C denied. Stay vacated. Petitioner to surrender by 7-14-76 So ordered. -- Marker, J. n/n By pro-ss Clerk		
7-12-76	6	Filed plffs. notice of appeal to the USCA from the order denying plffs. application for w/h/c. (copies mailed to Court of Special Sessions 87 Nepperhan Ave, Yonkers, NY and to Carl Vergari, D.A. for Westchester County, Court House, White Plains, NY 10601)		
7-16-76	7-	Filed ORDER, that Petitioner is permitted to proceed in forma pauperis -- Gottel, J. n/n		
			Certificate	
07-13-76		Hearing begun and concluded -/order of probable cause signed stay pending appeal granted.		

08-24-76 Filed petitioners affdvt. and OSC for Prob. Cause and a stay of
execution of sentence. Ordered that execution of sentence is stayed
pending disposition. - ret. 7-13-76
08-24-76 Filed CERTIFICATE OF PROBABLE CAUSE. -- Werker, J.
11-8-76 Filed transcript of proceedings dated July 7, 1976.

76-2154

A TRUE COPY
RAYMOND F. BURSTARDT, Clerk
By  Deputy Clerk



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
HOWARD LIPINSKI

-VS-

THE PEOPLE OF THE STATE OF NEW YORK

CASE NO. 76 Civ 2845

JUDGE Werker

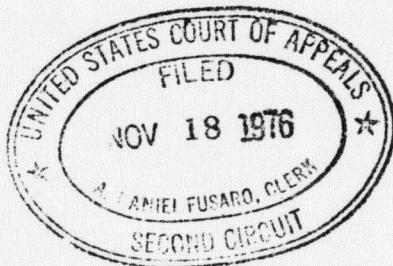
CLERK'S CERTIFICATE

-----X
I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A- B, and the original filed papers numbered 1 thru 5, ~~and exhibits~~, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILEDPROCEEDINGS

6-28-76 Petition for writ of habeas corpus.
7-8-76 Defendant's opposition to Writ of habeas corpus
7-9-76 Defendant's affidavit by Vincent L. Leibell in
opposition to writ.
7-9-76 Respondent's brief, Supreme Court State of NY as
exhibit.
8-6-76 Order that petitioner proceed in forma pauperis. Goette

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto
affixed, at the City of New York, in the Southern District of New York, this 8th
day of November, in the year of our Lord, One thousand nine hundred and
seventy six, and of the Independence of the United States the 201st year.



Raymond F. Bayhord
Clerk of the Court

SLIP MEMORANDUM

Judgment of conviction affirmed.

Defendant appeals from a judgment convicting him, after a jury trial, of attempted petit larceny in violation of sections 110.00 and 155.25 of the Penal Law, and sentencing him to thirty days in jail.

In the case at bar, the trial court properly dismissed the charge of petit larceny because the victim's agent, a sales clerk, was not deceived by defendant's representation, making it impossible for the crime to have been completed. However, this did not bar the court from substituting the charge of attempted petit larceny, which is a "lesser included offense" of petit larceny (CPL 1.20

[37]; see People v. Bauer, 32 AD 2d 463, affd. 26 NY 2d 915).

The information is not jurisdictionally defective because it failed to state that Gimbel's owned the property. It was sufficient to apprise defendant of the nature of the charge against him (People v. Paolillo, 15 Misc. 2d 1031, affd. 307 NY 736). Additionally, the failure of the complainant to read the complaint before signing it does not constitute a fatal defect (CPL 100.15), since complainant testified that he took an oath when he signed it. It is also noted that the return voucher had value, as defined by the larceny section of the Penal Law.

Moreover, the court properly excluded the prior oral statements made by the complainant to defendant's

father. The People had proved their case without complainant's testimony through the testimony of another security officer who witnessed the event. Defendant is entitled to cross-examine those witnesses who testify against him, but this does not entitle the accused to argue that the prosecution be required to place the complainant on the witness stand (cf. People v. Keller, 34 Misc. 2d 269). Additionally, defendant could not call complainant as a witness, as he did, and then seek to impeach him by prior unsworn oral statements (CPL 60.35[1]), through an offer of proof by means of tape recorded conversations. On this latter point, we believe that the present evidentiary rules should be modified by the Legislature and set forth our views below.

In this state our statutory scheme permits impeachment of one's own witness by admitting prior inconsistent statements, but only where the prior statement was made orally under oath or in writing signed by the witness, which is contradictory to the witness' testimony (CPL 60.35 [1]; CPLR 4514). Yet, the rule that a party vouches for the credibility of his witness is riddled with exceptions and appears to be headed for its final resting ground (Spampinato v. A.B.C. Cons. Corp., 35 NY 2d 287; IIIa Wigmore on Evidence [Chadburn Rev.] §896 et seq.). Rule 607 of the Federal Rules of Evidence permits impeachment of one's own witness and rejects the traditional voucher rule "as based on false premises" (Advisory Committee Note, Moore's Federal Practice Rules Pamphlet, Part 2, p. 615). In criminal cases,

the United States Supreme Court has noted that the voucher rule is primitive (Chambers v. Mississippi, 410 U.S. 284).

Sound recordings are admissible as evidence-in-chief upon proper authentication and proper foundation (People v. Lubow, 29 N.Y. 2d 58; Ann. 57 ALR 3d 746 "Admissibility of Inaudible Sound Recording"; Anno. 58 ALR 2d 1024, 1048 [impeachment] "Sound Recordings in Evidence"; 21 N.Y. Jur., Evidence, §371; see Federal Rule of Evidence 901.5; 17 Am. Jur., Proof of Facts, Tape Recordings as Evidence, §60). Furthermore, tape recordings are frequently utilized by local courts in lieu of stenographers (see People v. Deming, 80 Misc. 2d 53).

Despite the strictures of the predecessor to the CPLR, recordings have been held admissible on the issue of credibility in a civil case (Appelbaum v. Appelbaum, 84

NYS 2d 505) and have been the subject of pretrial discovery in civil (Baron v. Kings-Suffolk Realty Co., 4 Misc. 2d 587) and criminal proceedings (People v. Nasser, 60 Misc. 2d 27). Furthermore, recordings have been admitted to rebut the inference of recent fabrication (People v. Feld, 305 N.Y. 322, reh. den. 305 N.Y. 924). Moreover, the United States Supreme Court and the New York Court of Appeals have both noted that a taped conversation often is the best evidence of what was said (Lopez v. United States, 373 U.S. 427; People v. Gibson, 23 N.Y. 2d 618, cert. den. 402 U.S. 951; see Hoffa v. United States, 385 U.S. 293; Osborn v. United States, 385 U.S. 323). It is, therefore, the view

of this court that the State Legislature consider modernizing the statutory provisions regarding impeachment to encompass "the more sophisticated devices to which our times have become accustomed" (People v. Gibson, supra, p. 620) and permit a party to impeach his own witness by use of authenticated tape recorded statements which contradict the witness' testimony on a material issue.

State of New York

Court of Appeals

BEFORE: HON. MATTHEW J. JASEN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

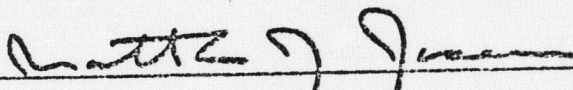
HOWARD LIPINSKI,

Appellant.

CERTIFICATE
DENYING
LEAVE

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Buffalo, New York
May 17, 1976.


Associate Judge

Order of Appellate Term, 9th and 10th Judicial
Districts, rendered February 26, 1976, affirming
Court of Special Sessions, City Court of Yonkers,

*Description of Order: judgment rendered December 11, 1974.

Howard Lipinski
525 Riverdale Avenue
Yonkers, New York 10705

PAPERS SUBMITTED RETURNED
HEREWITH.

Hon. Carl A. Vergari
District Attorney of Westchester County
County Court House, 111 Grove Street
White Plains, New York 10601

Attn.: Carl F. Lodes, Esq., Chief of the Appeals Section

TAPE RECORDING MADE AT 87 NEPPERHAN AVENUE, YONKERS, N.Y., BETWEEN ARTHUR LIPINSKI AND ROBERT BENDETSON ON MARCH 16, 1974.

ROBERT BENDETSON: What seems to be the problem?

ARTHUR LIPINSKI: Well, you tell me, what is the problem?

R.B.: I saw your son enter the store with a shopping bag. Myself and another detective; and followed him down to the Sporting Goods department. Inside the shopping bag was a

A.L.: I'm familiar with Gimbels. Is that on the Main Floor?

R.B.: He came in through the Central Park Doors, the Men's Department. We followed him in. He's been in the store before. Well-that's beside the point.

I saw he had a shopping bag. We followed him down. Inside the shopping bag nothing was sticking out. We followed him into the Sporting Goods Department. He went right to the tennis rackets. He took two tennis rackets off the wall and put them inside the shopping bag. I saw this and so did somebody else. He then went over to the cash register and produced a receipt for them. And that was that.

A.L.: He only took two racquets from the wall, you say?

R.B.: He took two tennis racquets off the wall and put them into a shopping bag. [There was another tennis racquet too; whether he wanted to buy it or exchange it or what, I don't know.] All I did was, see him take two tennis racquets off the wall and put them into the shopping bag; and walk over to the cash register.

A.L.: Where was the clerk at that time?

R.B.: He was there, by the cash register.

A.L.: Well, how close is the cash register to the tennis racquets?

R.B.: IT could be about ten feet. But there's a counter in front of it. The clerk could not see him.

A.L.: You say you saw him in the store before.

R.B.: That's right.

A.L.: Doing what?

R.B.: I just saw him.

A.L.: Well

R.B.: That had no bearing on it at all Mister. I do my job, okay?

A.L.: But I've been in this store, for example, a thousand times.

I don't know if every time I go into the store you follow me. Or if you follow everybody in.

R.B.: As far as that's concerned, I'll follow anyone I want or whoever I think is doing something.

A.L.: Well, that's the point I'm trying to find out. I've come into the store with shopping bags and other kinds of bags.

R.B.: I'll follow anybody that has a big bag.

A.L.: In other words, you followed him because he had a big bag?

R.B.: Sure.

A.L.: Were you able to see what he had in the bag?

R.B.: No. But I know he didn't have two tennis racquets. It was impossible to have two tennis racquets in there.

A.L.: How big a bag was it?

R.B.: Regular size shopping bag.

A.L.: Well, a regular size shopping bag is big enough

R.B.: O.K. I've said enough. I saw him take two tennis racquets and put them in the bag-so did my partner; that's all.

A.L.: Well, how far away were you from him?

R.B.: I can't tell you that. I can't tell you that.

CERTIFICATE OF SERVICE

Jan 17, 1977

I certify that a copy of this brief and appendix
has been mailed to the ~~Attorney General of the State~~
~~of New York~~. District Attorney of Westchester County

Rye Skiff